Supreme Court, U. S.
FILED
MAY 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1552

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

—v.—

RODRIGO PARTIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID G. HALL
103 East Third Street
Weslaco, Texas 78596

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Respondents

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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V.

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Respondent

On Petition for a Writ of Certiorari
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for the Fifth Circuit

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PRELIMINARY STATEMENT

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit seeking review of a judgment of that Court which reversed a judgment of the United States District Court for the Southern District of Texas denying post-conviction habeas corpus relief for Respondent, a state prisoner.

QUESTION PRESENTED

In holding that the State failed to produce sufficient evidence to rebut Respondent's prima facie case of grand jury discrimination, did the Court of Appeals decide a question of federal law in a way in conflict with applicable decisions of this Court?

STATEMENT OF THE CASE

Respondent Rodrigo Partida was indicted by the March Term, 1972 grand jury for the 92nd Judicial District Court of Hidalgo County, Texas. Respondent complained that the grand jury that returned the indictment had a characteristic in common with all Hidalgo County grand juries over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury panels.

In a direct appeal from the conviction on such indictment, the Texas Court of Criminal Appeals rejected Respondent's claims of jury discrimination on the merits, and Respondent was taken into the custody of the County Sheriff, Petitioner herein. On April 5, 1974, Respondent initiated the present action by filing his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas. That Court set the case for an evidentiary hearing, and in so doing, notified the Sheriff that it would be his burden to produce evidence explaining or justifying the "systematic underrepresentation of Mexican-Americans

in the Grand Juries of Hidalgo County...." (Record, Instrument No. 6: Memorandum and Order, p. 1)

The evidence upon which both the District Court and the Court of Appeals found to their satisfaction a prima facie case was a gross statistical disparity between the numbers of Mexican-Americans in the county population and those actually being chosen for grand jury service. According to the 1970 Census, 79.2% of the Hidalgo County population is composed of persons of Spanish language or Spanish surname. On the other hand, of those chosen for grand jury service by the jury commissioners over the ten-year period prior to Respondent's indictment, only 39.0% have been persons of Mexican descent or national origin. In other words, the disparity between the population norm and the jury norm has been 40.2%. (Record, Petitioner's Exhibit No. 2: Tr. 228, 266, and 268).

At the hearing before the District Court the only evidence offered by the Petitioner to explain the huge disparity in the percentages was the testimony of the state judge who presided over the selection of the grand jury. The state judge testified regarding his efforts to obtain balanced jury commissions, but stated that he did not instruct the commissioners on their duties under the Constitution to select juries that are representative of a cross-section of the community. (Record, Instrument No. 30: Transcript, pp. 19-21, 34). In addition, the judge admitted that the selection process had not resulted in

panels that were representative of the ethnic balance in the county. (Record, Instrument No. 30: Transcript, pp. 38-39). The State made no effort to introduce evidence that would explain or justify the statistical disparity proven by Respondent.

Nevertheless, the District Court held that the State had met its burden of rebuttal. The factors apparently relied upon by the District Court were (1) that the Respondent's statistics were based upon total population rather than adult population, (2) that the ten-year period taken for comparison was too extensive in a "rapidly changing area," (3) that a "larger ineligible migrant and illegal alien population" existed in the county, and (4) that Mexican-Americans constitute a "governing majority" in the county.

The Court of Appeals, in its opinion and judgment of December 11, 1975, agreed with the District Court that Respondent had proven a prima facie case, but disagreed that the evidence offered by the Sheriff was sufficient to explain the existing disparities. Irregardless of any presumed "governing majority" status by the class of discriminatees, the Court of Appeals held that "the unexplained disparities here are simply too great and too long existent for the county system to escape unrectified." Partida v. Castaneda, 524 F.2d 481, 485, n. 9 (5th Cir. 1975). Accordingly, the judgment of the District Court was reversed and remanded. After two stays requested by Petitioner had expired, the Court of Appeals issued its mandate on April 19, 1976.

REASONS FOR DENYING THE WRIT

1. The sole ground for review urged by Petitioner is a contention that the Court of Appeals decided a question of federal law in a manner inconsistent with previous decisions of this Court. Yet Petitioner fails to indicate a single federal question decided by the Court of Appeals that conflicts with a decision of this Court. The reason for that failure is readily apparent: the lower court ruled on a matter of evidence, not law.

The principle error suggested by the Petitioner does not involve a novel question of federal law, but rather a question of evidence. There is no real dispute among the parties regarding issues of law, for the principles governing challenges to jury composition have been carefully refined by this Court in almost 100 years of decisions: Strauder v. West Virginia, 100 U.S. 303 (1880) to Taylor v. Louisiana, 419 U.S. 522 (1975). The principles are well settled; it is their application to present facts that provoke controversy.

The question resolved by the Court of Appeals was whether the Petitioner had sustained his burden of rebuttal. In determining that he had not, the appellate court embarked on no new judicial ventures. The Court of Appeals merely measured the failure of the Petitioner's offer of proof. In the face of statistics documenting a gross exclusion of Mexican-Americans from the grand juries of the county, the Petitioner offered no statistical evidence of his own that would even partially explain

the disparate treatment of the ethnic groups in the jury pools. Rather than facts, the Petitioner offered his own interpretations of Respondent's data and the assurances of the state judge who initiated the selection process that he had not intentionally discriminated against any identifiable class.

The Court of Appeals found that offer of evidence wanting when measured against established legal standards. A comparison of the 40.2% disparity proven by Respondent with that deemed sufficient to prove a prima facie case in recent decisions of this Court demonstrates that the disproportion is not only substantial, it is enormous. Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) (prima facie case: 65% total black population, but only 32% black representation on jury panels); Turner v. Fouche, 396 U.S. 346 (1970) (prima facie case: 60% total black population, but only 37% black representation on grand jury list); Whitus v. Georgia, 385 U.S. 545 (1967) (prima facie case: 42.6% adult black population and 27.1% black taxpayers, but only 9.1% blacks on grand jury venire and 7.8% on petit jury venire); Jones v. Georgia, 389 U.S. 24 (1967) (prima facie case: 30.7% adult black population and 19.7% black taxpayers, but only 5% on jury lists); Sims v. Georgia, 389 U.S. 404 (1967) (prima facie case: 24.4% black taxpayers, but only 4.7% blacks on grand jury lists and 9.8% in jury pool); Swain v. Alabama, 380 U.S. 202 (1965) (no prima facie case: 26% adult black population, 10% to 15% black representation on grand and petit jury panels); Alexander v. Louisiana, 405 U.S.

625 (1972) (prima facie case: 21.06% adult black population in the parish, but only 6.75% black representation on grand jury venire); Taylor v. Louisiana, 419 U.S. 522 (1975) (53% adult female population, but only 10% on jury venires). The statistical case offered by Respondent clearly fell within the parameters of previous case law. The Petitioner's rebuttal evidence, in the words of the Circuit Court, was simply "too paltry."

2. The only novel legal issue to arise in the course of this litigation was the District Court's treatment of the perceived status of Mexican-Americans as a "governing majority." Hampered by the deficiencies in the record caused by the failure of the Petitioner's proof, the trial court sought to distinguish all precedent decisions on the basis that the discriminatees in those cases were either a minority or a "non-governing majority," citing Black v. Curb, 464 F.2d 165 (5th Cir. 1972); Turner v. Fouche, 396 U.S. 346 (1970); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); and Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969). Not only do none of the cited opinions articulate the "non-governing majority" distinction, none of them, with the possible exception of Turner, even discuss the level of political participation by the class subjected to discrimination. The Turner opinion mentions political participation only tangentially and in connection with the unusual role played by the grand jury in the selection of the board of education; there is absolutely no suggestion that blacks in Georgia would not be heard to complain

of discrimination if they were a "governing majority."

The proposed "governing majority" doctrine is not only completely without precedent, it would also be cumbersome and difficult in its application. Even experts in the field of political science would find it difficult to determine the level or degree of participation by any identifiable class or group in the processes of the body politic. In addition to quantitative data, such as the numbers and characteristics of registered voters and office-holders, evaluation of qualitative factors would be required as well, such as the amount of power and influence wielded by any given office-holder and a determination of whether the official is representing the interests of the class of discriminatees or instead is a figurehead for another group or class. Rather than grapple with such difficult factual issues, the temptation becomes great for the trial court to resolve the matter by judicial notice, as was apparently the case here. The District Court's determination that Mexican-Americans are a "governing majority" in Hidalgo County has virtually no support in the record. For example, there are no statistics showing the number of registered Mexican-American voters as compared to Anglo voters, nor the number of Mexican-American office-holders and the types of offices held. Yet without empirical evidence or expert opinion, the lower court concluded that Mexican-Americans were a "governing majority."

In addition to being cumbersome and difficult in its application, the suggested

rule would be pernicious as well. If the "governing majority" distinction were applied as it was by the District Court, a class of discriminatees, once having achieved "governing majority" status, could no longer complain of a conviction obtained at the hands of a jury from which members of the class had been systematically excluded. Such a rule mocks the Fourteenth Amendment's promise of a trial before an impartial jury of one's peers. Cf. Taylor v. Louisiana, 419 U.S. 522 (1975).

3. Finally, Petitioner would have this Court believe that the Circuit Court's decision was the death knell for the jury commissioner system in Texas. Unfortunately, such is not the case. Although the Texas system has passed constitutional muster in this Court on several occasions, Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); and Hernandez v. Texas, 347 U.S. 475 (1954), its application in individual cases has frequently been found wanting. And although Respondent would applaud its burial, it remains a system capable of producing fair results when administered by those who understand and adhere to "...what duty requires." Cassell v. Texas, supra, at 293 (Frankfurter, J., concurring.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David G. Hall
103 E. Third Street
Weslaco, Texas 78596
512/968-9574

Melvin L. Wulf
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Respondents

May, 1976